Supreme Court, U.S.
FILED

No. 06-561

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IN THE
SUPREME COURT OF THE UNITED STATES

BEVERLY SMITH,

Petitioner,

v.

DEANNA COOK AND ANGELA SMITH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE VIRGINIA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether an attorney is a state actor for purposes of an action under 42 U.S.C. § 1983 for violation of the Due Process Clause of the United States Constitution in the fact-specific circumstance where the attorney issues and causes to be served a subpoena of a nonparty's medical records without prior notice and opportunity to be heard in a state which does not provide any remedy to the nonparty for the deprivation of that property interest in privacy when the disclosure is made in response to the subpoena.

Whether, in the context of the narrow facts of this case, by failing to give the requisite notice to a person not a party to the litigation that her medical records were being commanded by subpoena to be produced in a state where there is no deterrence created by a viable cause of action or remedy against the health care provider for producing the records without notice to the patient in response to the subpoena, is the act of issuing the subpoena and causing it to be served upon the health care provider without notice to the patient sufficient to hold the attorney to have wielded the compulsive power of the state to seize the patient's property without pre-deprivation notice or opportunity to be heard in violation of the Due Process Clause of the United States Constitution

PARTIES TO THE PROCEEDINGS

Petitioner is Beverly Smith.

Respondents are Deanna Cook, an attorney in the Commonwealth of Virginia and her client Angela Smith.

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PETITION FOR WRIT OF CERTIORARI

Brenda Smith ("Smith") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Virginia Supreme Court entered in this proceeding on July 26, 2006, in order to resolve the important issue presented herein, that under certain very narrow factual circumstances, a nonparty witness deprived of her property interest in the privacy of her medical records without notice or opportunity to be heard may obtain relief under 42 U.S.C. § 1983 against a private attorney who is a state actor when issuing and causing to be served a subpoena commanding the production of medical records in violation of the Due Process Clause of the United States Constitution when those records are produced and disseminated.

OPINIONS BELOW

The opinion of the Virginia Supreme Court that gives rise to this petition is the order of the Virginia Supreme Court denying Smith's petition for appeal. It is reprinted in Appendix A hereto at page A1. The order of the trial court, the Circuit Court for the City of Richmond in the Commonwealth of Virginia denying Smith a remedy for the deprivation of her privacy of the medical information in her medical records as a nonparty witness in prior litigation is set forth in Appendix C at page A4. The order of the trial court correcting its order of January 19, 2006 is set forth in Appendix B at A3.

JURISDICTION

On July 26, 2006, the Virginia Supreme Court denied Smith's petition for appeal of the January 19, 2006 order of the Circuit Court for the City of Richmond denying Smith's claim of a deprivation of her rights under the Due Process Clause of the United States Constitution. Pursuant to Supreme Court Rule 13(1) this petition has been filed within 90 days of the denial of her petition.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Amendment XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
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> * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42. U.S.C. § 1983

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Va. Code § 32.1-127.1:03, as amended in 2002

Appendix E

Va Code § 16.1-265. Subpoena; attorney-issued subpoena.

Upon application of a party and pursuant to the rules of the Supreme Court of Virginia for the issuance of subpoenas, the clerk of the court shall issue, and the court

on its own motion may issue, subpoenas requiring attendance and testimony of witnesses and production of records, documents or other tangible objects at any hearing.

Subpoenas duces tecum for medical records shall be subject to the provisions of §§ 8.01-413 and 32.1-127.1:03 except that no separate fee shall be imposed. A subpoena may also be issued in a civil proceeding by an attorney-at-law who is an active member of the Virginia State Bar at the time of issuance, as an officer of the court. Any such subpoena shall be on a form approved by the Committee on District Courts, signed by the attorney as if a pleading and shall include the attorney's address. A copy, together with the attorney's certificate of service pursuant to Rule 1:12, shall be mailed or delivered to the clerk's office of the court in which the case is pending on the day of issuance by the attorney. The law governing subpoenas issued by a clerk shall apply mutatis mutandis, except that attorneys may not issue subpoenas in those cases in which they may not issue a summons as provided in § 8.01-407. When an attorney-at-law transmits one or more subpoenas or subpoenas duces tecum to a sheriff to be served in his jurisdiction, the provisions in § 8.01-407 regarding such transmittals shall apply. A sheriff shall not be required to serve an attorney-issued subpoena that is not issued at least five business days prior to the date production of evidence is required.

If the time for compliance with a subpoena issued by an attorney is less than 14 days after service of the subpoena, the person to whom it is directed may serve upon the party issuing the subpoena a written objection setting

forth any grounds therefor. If objection is made, the party on whose behalf the subpoena was issued and served shall not be entitled to compliance, except pursuant to an order of the court, but may, upon notice to the person to whom the subpoena was directed, move for an order to compel compliance. Upon such timely motion, the court may quash, modify or sustai the subpoena.

STATEMENT OF THE CASE

Beverly Smith ("Smith") filed suit in state court against Angela Cook ("Cook"), her client Angela Smith and others seeking redress pursuant to 42 U.S.C. § 1983 for denial of due process in connection with the deprivation of her privacy interest in the health care information contained in her medical records, and the right to contest the disclosure and dissemination of that information, interests protected by both state statute and by the penumbra of the United States Constitution.

Cook, a private attorney licensed by the Commonwealth of Virginia, on behalf of her client Angela Smith and as an officer of the court, pursuant to Va Code § 16.1-265 issued a subpoena to a health care provider for Smith's medical records in a custody case in which patient Smith was not a party without providing the statutorily required notice under Va. Code § 32.1-127.1:03.

In 2002, Va. Code § 32.1-127.1:03 provided in pertinent part, "No party to an action shall request or cause the issuance of a subpoena duces tecum for the medical records of a nonparty witness unless a copy of the request for the subpoena or a copy of the attorney-issued subpoena is provided to the nonparty witness simultaneously with filing the request or issuance of the attorney-issued subpoena." Additionally, the statute required that with a copy of the subpoena, the nonparty witness was to receive "a statement informing them of their rights and remedies...."

Cook did not send a copy of the subpoena to Smith as required by statute and Smith did not receive the copy of the attorney issued subpoena or the notice and statement of rights and remedies required by law, prior to the deprivation of her medical privacy.

Once served and in response to the subpoena the health care provider produced the records disclosing Smith's personal and confidential content and information in her psychiatric medical records without her authorization, resulting in the loss of her statutory right of privacy to the content and information of her medical/health records and in emotional and physical injuries.

While Virginia in *Fairfax Hospital v. Curtis*, 254 Va. 437,492 S.E.2d 642 (1997) recognized a cause of action against medical care providers for unauthorized disclosure of a patient's health care information, the Virginia Court determined that disclosure of that information in response to a subpoena is not unauthorized irrespective of the failure of the attorney to provide the statutory notice and disclosures and not actionable under state law.

The suit including the due process claim brought under 42 U.S.C. § 1983 was dismissed on January 19, 2006 for failure to state a cause of action on the demurrer to the pleadings filed by the defendant.

A petition for appeal was timely filed to the Virginia Supreme Court. The Virginia Supreme Court denied the petition for appeal on July 26, 2006.

This petition for certiorari is timely filed.

REASONS FOR GRANTING THE WRIT

I. In rare and fact specific circumstances, an attorney should be considered a "state actor" liable for violation of due process when the private attorney, acting on her client's behalf and as an officer of the court, invokes the machinery of the state to effect an ex parte seizure of property without prior notice or an opportunity to be heard.

In most instances involving attorney issued subpoena the party to whom the subpoena is directed and the parties to the litigation receive notice of the issuance of the subpoena and are able to be heard before any deprivation occurs.

Merely because the instances are rare in which an attorney issuing a subpoena invokes the machinery of the state to effectuate an ex parte seizure of property without prior notice or opportunity to be heard does not justify a

blanket rule of law, removed from factual inquiry, that a private attorney issuing a subpoena can never be a state actor. A number of Federal Circuits and states have held otherwise. *See Hahn v. Star Bank*, 190 F.3d 708, 717 (6th Cir. 1999)("a private attorney issuing a subpoena does not become a state actor for the purposes of § 1983") *Barnard v. Young*, 720 F.2d 1188, 1189 (10th Cir. 1983)("Application of the *Lugar* test does not change the vast weight of authority that private attorneys, by virtue of being officers of the court, do not act under color of state law within the meaning of section 1983. *Polk County v. Dodson*, 454 U.S. 312, 318, 70 L. Ed. 2d 509, 102 S. Ct. 445 (1981). n2") *Angelico v. Lehigh Valley Hosp., Inc.*, 184 F.3d 268, 278 (3d Cir. 1999)("an attorney does not become a state actor simply by employing the state's subpoena laws") See also *Atlas v. Stolberg*, 694 So. 2d 772 (Fla. 4th DCA 1997)("it is well settled that private lawyers are not state actors for purposes of section 1983 liability") *Dyess v. La. State Univ. Bd. of Supervisors*, 2005 U.S. Dist. LEXIS 18314 (D. La. 2005) ("This Court concurs with these decisions and holds that a private attorney's issuance of a subpoena does not make the attorney a state actor for purposes of § 1983" and "the Fifth Circuit has not addressed whether an attorney who issues a subpoena may fairly be said to be a state actor, it has held that "private attorneys . . . are not official state actors, and generally are not subject to suit under section 1983." *Mills v. Criminal Dist. Court # 3*, 837 F.2d 677, 679 (5th Cir. 1988)).

A claim upon which relief may be granted to Smith against Cook under § 1983 must embody at least two elements. Smith is first bound to show that she has been deprived of a right "secured by the Constitution and the laws" of the United States. Smith must secondly show that Cook

deprived her of this right acting "under color of any statute" of the State of Virginia. It is clear that these two elements denote two separate areas of inquiry. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155-156 (U.S. 1978) *citing* Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970).

In order to rely on the Due Process Clause, a plaintiff must have a protectible interest. Smith's protectible interest is her constitutional and statutory interest in medical privacy. Virginia law recognizes plaintiff's rights of privacy in Virginia Code § 32.1-127.1:03. Likewise, Smith has a constitutional right to medical privacy. *See eg. Roe v. Wade,* 410 U.S. 113, 93 S. Ct. 705 (1973), *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678 (1965) (marital privacy in decisions of birth control). Defendant Cook deprived plaintiff of her right to medical privacy under Virginia law and her property interest in medical privacy without notice or an opportunity to be heard in violation of Fourteenth Amendment to the U.S. Constitution.

Because the Fourteenth Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as "state action." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 923-924 (1982). Here, under applicable U. S. Supreme Court precedent, the State's express "deputization" of attorney Cook to issue process, and the service of the process on the health care provider, caused the unlawful release and disclosure of Smith's private health/medical information in the medical records as well as the right to contest the disclosure of that information, property rights granted to her by Virginia statute and protected by the Due Process Clause of the Constitution. The claim against defendant Cook thus concerns the relationship between the §

1983 requirement of action under color of state law and the Fourteenth Amendment requirement of state action. *Id.*

The question of whether an individual acted "under color of state law" and, therefore, whether the individual is liable for the federal or constitutional injury under 42 U.S.C. § 1983, is inherently a mixed question of law and *fact* and has been recognized by the U. S. Supreme Court **as fact specific**. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 938-939 (1982). It necessarily requires a sifting of the facts and circumstances involving any alleged public-private action. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

The "State Action" In this Case

The actions which caused the injury in this case involve State-authorized and served legal process commanding the production of the medical records of Smith without prior notice to Smith or opportunity to be heard and without any deterrence to health care providers from complying with the subpoena's command.

The force and compulsion of state power is behind an attorney-issued subpoena. A subpoena is the order of an arm of the state compelling the presence of a person under threat of contempt. That the state traditionally grants litigants and their attorneys the privilege of invoking the subpoena power does not alter the fact that it is the state, not the litigant or his attorney, which is compelling the attendance. The state could not effectively provide a forum for the litigation of legal disputes without power to compel the attendance of witnesses. The fact that a subpoena issues in the name of the

state and the fact that a subpoena implements the general state interest of providing a forum for litigation amply demonstrate that the issuance of a subpoena is not merely a private act. The litigant or attorney who invokes the subpoena power acts for the state when commanding production of documents. Because she is engaged in litigation in a state forum, she has been entrusted by the state with significant state power. The significance of a private party acting for and in the name of the State is not a new concept. Virginia has provided the United States Supreme Court with a number of opportunities that explain the reach of the Constitution in restraining violations made under color of state law which include *Ex parte Va.,* 100 U.S. 339, 347 (U.S. 1880). In that case, this Court addressed the restraint of the Fourteenth Amendment against "one who acts in the name and for the State and is clothed with the State's power."

The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.

But the Constitutional Amendment was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was

given to Congress to enforce its provisions by appropriate legislation. Such legislation must act upon persons, not upon the abstract thing denominated a State, but upon the persons who are the agents of the State in the denial of the rights which were intended to be secured. *Ex parte Va.*, 100 U.S. 339, 347 (1880). There can be no doubt at least since *Ex parte Virginia*, 100 U.S. 339, 346-347, that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it. *See Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278, 287-296, 33 S. Ct. 312 (1913); *Monroe v. Pape*, 365 U.S. 167, 171-172, 81 S. Ct. 473, 497 (1961) partially overruled by *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 695-701, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978) (municipalities are not immune from § 1983 actions)

Congress, in enacting § 1983 meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position. *Cf. Williams v. United States*, 341 U.S. 97, 71 S. Ct. 576 (1951); *Screws v. United States*, 325 U.S. 91, 65 S. Ct. 1031 (1945); *United States v. Classic*, 313 U.S. 299, 61 S. Ct. 1031 (1941). *Monroe v. Pape*, 365 U.S. at 172, 81 U.S. at 497.

In the present case, Cook caused an attorney-issued subpoena to be served upon Dr. Kryzanowski for the production of a non-party's private health care records without providing the statutorily mandated notice under Virginia Code § 32.1-127.1:03 to the non-party, Smith. The content of those records was thereafter indiscriminately disclosed to the attorneys and litigants in a state domestic

proceeding and Smith was harmed suffering humiliation, emotional and physical injuries. Smith was damaged by the loss of her right to have a judicial officer determine whether there was a basis for disseminating her confidential patient information and communications with her doctor to third persons before the dissemination. Smith was required to obtain medical treatment and incurred medical bills associated with the disclosure. AMFJ § 66 – 73

The Applicable Tests

As previously indicated, the question of whether an individual acted "under color of state law" and, therefore, whether she is a "state actor" is fact specific. The focus is not whether the person is a state employee.[1] Although in

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[1] See, e.g., *Polk County v. Dodson*, 454 U.S. 312, 318, 70 L. Ed. 2d 509, 102 S. Ct. 445 (1981), where the Supreme Court held that a public defender's actions, when performing a lawyer's traditional functions as counsel in a state criminal proceeding, would *not* support a § 1983 suit. However, the Court specifically stated that it was not necessary in that case to consider whether that requirement was identical to the "state action" requirement of the Fourteenth Amendment because the public defender, although a state employee, in the day-to-day defense of his client, acted ***in a role adversarial to the State***. Accordingly, on the facts of that case, it was "peculiarly difficult" to detect any action of the State. 454 U.S., at 320. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 (U.S. 1982). In the present case, however, attorney Cook was *not* in an adversarial role to the State, but was acting as an arm of the state using the expressly granted power and agency of the State to command by legal process

most instances being employed by the state will suffice due to the duties of the employee, but as will be explained below, the reverse is also true, one need not be an employee of the state to act under color of state law. In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 938-939 (1982), the "complaint alleged that in attaching his property respondents had acted jointly with the State to deprive him of his property without due process of law." To sustain the claim, the Supreme Court required that conduct alleging deprivation of a Federal right must be "fairly attributable" to the State. Two elements establish "fair attribution," elements which are present in the case at bar: (1) the deprivation must be caused, in part, by either the exercise of some right or privilege created by the State or by a person for whom the State is responsible, and (2) the party charged with the deprivation must be said to be a state actor. The latter is satisfied not only if he is a state official, but also *if he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Id.* at 937. In interpreting this standard, courts have made clear that "both parts of the *Lugar* test *are satisfied* where the nature of the relationship between the state and private actor is one of interdependence or `symbiosis,'" i.e. an "arrangement that confers on each a variety of mutual benefits." *Jackson v. Pantazes*, 810 F.2d 426,430 (4th Cir. 1987), *citing Burton v. Wilmington Parking Authority*; *see also Dennis v. Sparks*, 449 U.S. 24, 27-29 (1980); *Pfannsteil v. City of Marion*, 918 F.2d 1178, 1187 (5th Cir. 1990); *Crowe v. Lucas*, 595 F.2d 985 (5th Cir.

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the release of Smith's private medical information, albeit without affording Smith the due process to which she was entitled.

1979).[2] In keeping with the fact specific nature of "state action," the *Lugar* Court noted a variety of tests under which state-action may be established:

> [T]he Court has articulated a number of different factors or tests in different contexts: e. g., ***the "public function" test***, *see Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946); ***the "state compulsion" test***, *see Adickes v. S. H. Kress & Co.*, 398 U.S., at 170; ***the "nexus" test***, *see Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); and, in the case of prejudgment attachments, ***a "joint action test***," *Flagg Brothers*, 436 U.S., at 157. n21 Whether these different tests are actually different in operation or simply different

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[2] Numerous other Supreme Court cases have recognized that private action is fairly attributable to the state. *See Terry v. Adams*, 345 U.S. 461 (1953) (Political activities of the private, racist Jaybird Association deprives citizens of voting rights because of their color); *Burton v. Wilmington Parking Authority*, 365 U.S. at 725 ("By its inaction, the Authority, and through it the state, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination"); *Lombard v. Louisiana*, 373 U.S. 267 (1963) (Action by private lunch counter owner constituted state action despite absence of state ordinance requiring discriminatory conduct); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969) (Actions by private homeowners association under restrictive covenants enforcible by state process constituted state action).

> ways of characterizing the ***necessarily fact-bound inquiry*** that confronts the Court in such a situation need not be resolved here. See *Burton*, supra, at 722 ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance").

Lugar v. Edmondson Oil Co., 457 U.S. at 938-939 (1982)(emphasis added).

Using the public function test, the Supreme Court has found state action present "in the exercise by a private entity of powers traditionally exclusively reserved to the State." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974). In the present case, the subpoena power is a power traditionally exclusively reserved to the state. By statute that power is exercised by an officer of the court, the attorney Cook. The public function test is satisfied. The joint action test for state action is met where private persons are "willful participant[s] in joint activity with the State or its agents" that effects a constitutional deprivation. *Howerton v. Gabica*, 708 F.2d 380, 383 (CA9 1983).

Attorney Cook, although a private attorney and acting on behalf of her client, a private party, willfully participate in the joint activity with the State and specifically the judiciary by compelling production of documents by means of a subpoena duces tecum. The joint action test is satisfied. Finally, under the nexus test, the court must consider whether there is a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."

Jackson, 419 U.S. at 351. Here it is important to note that the power to issue the subpoena duces tecum is not given to the public at large, but is given to attorneys, a profession regulated by the State and ultimately the court. The subpoena on its face reeks of the authority of the State. "To the person summoned: You are commanded to make available the documents and tangible things designated and described below...." It is hard to imagine a closer nexus to the state, then the wielding of the judiciaries power to command the production of the documents. The nexus test is satisfied.

Instigating state court litigation does not make an attorney a state actor, due to the fact that as this court and all attorneys know, instigating litigation does nothing to take property from a person. Most of the actions conducted by attorneys in representing private parties before the courts of the Commonwealth of Virginia may not be attributed to the state and are therefore not state action. However, on the specific facts of this case, the question is whether the attorney, armed with the subpoena power has been clothed to act in the name and for the State, by virtue of the statutory authority and power expressly granted to the attorney as an officer of the court to issue a subpoena for documents **commanding** under threat of legal sanction the production of those documents without affording to a non-party the notice that their property interests are about to be taken and without any deterrence or liability of the physician to determine whether the patient was given notice of the subpoena.

There is no question but that Beverly Smith's property interest in the privacy of her health records was taken from her without notice or opportunity to be heard. In

this regard, she was "deprived . . . of life, liberty, or property, without due process of law" by persons who were "the agents of the State in the denial of the rights which were intended to be secured." *Ex Parte Virginia, supra,* 100 U.S. at 347. In issuing the subpoena, Cook, was not merely engaging in private practice of law on behalf of her private client—she was also acting as the agent of the State, ordering the production of the documents and with it the property of Beverly Smith, the confidential health information. The actions of issuing and causing to be served the process, these action are chargeable as "State actions" and Cook is liable for the violations of law and injury that arise from her authorized but improper actions.

In *Lugar v. Edmonson Oil Co.*, it was the joint action of the creditor with the clerk and the Sheriff that caused the taking, satisfying the "**joint action test**." *See, Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 939, 102 S. Ct. at 2755 n.21. In *Lugar*, it was the pre-judgment taking, accomplished with the assistance of the sheriff, that created an actionable constitutional violation. In that case, a lessee-operator of a truckstop in Virginia was indebted to his supplier, an oil company. *Lugar,* 457 U.S. at 924. The supplier sued on the debt and sought prejudgment attachment of the lessee's property. *Id.* Under Virginia law, the prejudgment attachment procedure required only that the creditor allege in an ex parte petition a belief that the debtor was disposing of or might dispose of his property in order to defeat his creditors. *Id.* Acting upon the petition of the supplier, the clerk of the state court issued a writ of attachment, which was then executed by the county sheriff, thereby sequestering lessee's property. *Id.* The Supreme Court held that where a state has created a procedure whereby state officials, acting on the ex parte

petition of a private party, may attach disputed property, state action exists. *Id.* at 941-42.

> "'Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents,'"

Lugar v. Edmondson Oil Co., 457 U.S. 922, 941 (U.S., 1982), *quoting United States v. Price*, 383 U.S., at 794. The U.S. Supreme Court has "consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (U.S., 1982).

In the present case, the taking of Smith's privacy was accomplished by virtue of Cook's joint role both as private advocate and also as an officer of the Court authorized by statute to issue the subpoena for the documents, satisfying the both the "**joint action test**" and the "**public function test**." *Lugar* at 938-39 *citing Terry v. Adams*, 345 U.S. 461 (1953), a case involving a political parties exclusion of persons based upon race and *Marsh v. Alabama*, 326 U.S. 501 (1946), a case involving a corporation owned town's prohibition on distribution of literature. In both cases, the traditional role of government in voting or management of a town caused the Court to consider the public function rather than the fact that the political party and corporation were private.

Similarly, Cook, by issuing the subpoena, fulfilled the role of the court which traditionally issued orders for the production of documents. Under the facts of this case, where Beverly Smith was denied the statutory notice and opportunity to be heard, it is even more important to cause the legislation to act upon persons and not the abstract thing denominated a State, but upon persons who are the agents of the State in the denial of the rights which were intended to be secured. *Ex parte Va.*, 100 U.S. 339, 347 (U.S. 1880).

Additionally, holding Cook to be acting under of color of state law under the circumstances of this case is required by ***the "nexus" test.*** *Lugar*, at 938-39 *citing Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) and *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). In this case, the authority to issue subpoenas by attorneys is given, and therefore the proscriptions of the Fourteenth Amendment must be complied with by the attorney as certainly as though the proscription was written into the statute authorizing the attorney to issue the subpoena, as in fact it is. In *Burton*, a case involving a private restaurant leasing space from a public facility, the Court stated, "what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 726 (U.S. 1961). The Court reiterated the detailed inquiry necessary in deciding these cases, stating "But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the

regulated entity so that the action of the latter may be fairly treated as that of the State itself. *Moose Lodge No. 107*, supra, at 176. The true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine whether the test is met. *Burton v. Wilmington Parking Authority, supra." Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (U.S. 1974) (finding no state action in a regulated enterprise).

The Third Circuit in *Angelico* recognized the necessity of a fact specific inquiry hedging its ruling with the term "simply" and cited approvingly from *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1264 (3d Cir. 1994), that

> a private individual who enlists the compulsive powers of the state to seize property by executing on a judgment without pre-deprivation notice or hearing acts under color of law and so may be held liable under section 1983 if his acts cause a state official to use the state's power of legal compulsion to deprive another of property.

Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268, 278 (3d Cir. 1999) *citing Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d at 1267.

Private attorneys, acting on their client's behalf, who invoke the machinery of the state to effect an ex parte seizure of property without notice or opportunity to be heard should be found to be state actors under § 1983.

The specific legal and factual inquiry must focus on the compulsive power of the state to seize property without pre-deprivation notice or an opportunity to be heard. In the context of the narrow facts of this case, the inquiry is whether by failing to give the requisite notice to a person not a party to the litigation that her medical records were being commanded by subpoena to be produced where there is no deterrence created by a viable cause of action or remedy against the health care provider for producing the records without notice to the patient in response to the subpoena, is the act of issuing the subpoena and causing it to be served upon the health care provider without notice to the patient sufficient to hold the attorney to have wielded the compulsive power of the state to seize the patient's property without pre-deprivation notice or opportunity to be heard in violation of the Due Process Clause of the United States Constitution.

In *Angelico*, the Third Circuit focused on the distinction between the potential for state involvement and actual state involvement. *Angelico v. Lehigh Valley Hosp., Inc.,* 184 F.3d 268, 278 (3d Cir. 1999). The court approved of the lower court's analysis which in pertinent part provided:

> Although plaintiff notes that there are potential legal consequences attached to failure to obey a subpoena which might ultimately involve invoking the assistance of state officials, such possibility serves only to highlight the difference between resorting to an available state procedure and actually using state officials to enforce or carry out that procedure. The potential for involving the coercive power of the state likewise exists when a judgment by confession is entered, yet . . . a private party is not converted into a

> state actor as long as the assistance of state officials remains merely a potential threat. It is only when, and if, such potential is realized that a private party may be converted into a state actor for purposes of satisfying the state action element of a § 1983 claim. Angelico I, 1996 WL 524112, at 2.

The Third Circuit found the analysis sound and consistent with the Supreme Court's analysis in *Lugar*, concluding "We hold, therefore, that an attorney does not become a state actor simply by employing the state's subpoena laws." *Angelico v. Lehigh Valley Hosp., Inc.*, 184 F.3d 268, 278 (3d Cir. 1999).

In *Angelico*, the defendants were lawyers who were retained to obtain and execute a confessed judgment in a rent dispute.

In the present case, where the state does not provide any deterrence to health care providers from producing the health care records in response to the subpoena by denying any cause of action against them coupled with the attorney's failure to provide any pre-deprivation notice to the patient, the command of the state authorized subpoena is itself the compulsive power of the state, the machinery of the state to effect an ex parte seizure of property upon which the private attorney can be found to be a state actor under § 1983 and liable for failing to provide notice and opportunity to be heard.

The Amended Motion for Judgment Properly Alleged The Necessary State Action to Sustain an Actionable §1983 Claim

Under the facts alleged in the Amended Motion for Judgment, defendant Cook, acting under color of state law, deprived Beverly Smith not only of the confidential mental health information, but also her right to notice of the subpoena to enable her to move to quash. Cook acted under color of state law. A9-A13 (¶¶ 7, 8, 9, 10, 11, 16, 19.) Smith had a property right to the content of her medical record and the privacy of that content. Va. Code § 32.1-127.1:03. A14 (¶ 23 & 25). As an officer of the Court, and pursuant to state statute, Cook acting for Angela Smith caused the loss of that property right without notice or an opportunity to be heard in violation of due process under the Fourteenth Amendment to the United States Constitution. A14-A16 (¶¶ 22 – 37). Beverly Smith was damaged as a proximate result. A15-A18 (¶ 36 & 37).

Upon *de novo* review, defendant Cook's assertion on demurrer that Smith failed to state a cause of action under 42 U.S.C. § 1983 should therefore be overruled and denied and the case remanded to Virginia for trial consistent with this Court's ruling.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE VIRGINIA SUPREME COURT DATED AND FILED JULY 26, 2006

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 26th day of July 2006.

Beverly Smith, Appellant,

against Record No. 060761
Circuit Court No. 760CL04S01780-00/06-697

Leslie J. Kryzanowski, et al., Appellees.

From the Circuit Court of the City of Richmond

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

APPENDIX B

OPINION OF THE CIRCUIT COURT FOR THE CITY OF RICHMOND, COMMONWEALTH OF VIRGINIA DATED AND FILED JUNE 19, 2006

VIRGINIA:
IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

BEVERLY SMITH,
Plaintiff
v. CASE NO. 760CL04201780-00

LESLIE J. KRYZANOWSKI, et al.
Defendants.

ORDER CORRECTING CLERICAL MISTAKES AND ERRORS ARISING FROM OVERSIGHT

Upon the motion to correct the order of 1/19/06, and in keeping with the Court's opinion as set forth in its letter of January 11, 2006 and incorporated in said order, it is ADJUDGED ORDERED and DECREED that the last paragraph of page 2 of the order dated 1/19/2006 is corrected to read

"IT FURTHER APPEARING that Plaintiff's Motion for Judgment and First Amended Motion for Judgment were filed by Plaintiff and her counsel, Thomas H. Roberts, Esquire and are NOT in violation of Virginia Code Ann §

8.01-271.1 and that the Plaintiff's claim under 42 U.S.C. § 1983 was NOT unreasonable, frivolous, meritless and vexatious so as to award costs and attorneys fees under 42 U.S.C. § 1988, it is hereby"

The endorsements of counsel are dispensed with in the discretion of the court pursuant to Rule 1:13.

APPENDIX C

OPINION OF THE CIRCUIT COURT FOR THE CITY OF RICHMOND, COMMONWEALTH OF VIRGINIA DATED AND FILED JANUARY 19, 2006

V I RG I N I A:
IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
JOHN MARSHALL COURTS BUILDING

BEVERLY SMITH
Plaintiff,
v. Case No. 760CL04S01780-00/06-697
LESLIE J. KRYZANOWSKI, et al.,
Defendants.

ORDER

THIS MATTER CAME TO BE HEARD upon the Motions to Reconsider this Court's overruling of the Demurrers of Defendants Deanna Cook ("Cook") and Angela Smith to Count II (Negligence) of the First Amended Motion for Judgment ("AMJ") filed by Plaintiff Beverly Smith, and upon the alternative Motions for Summary Judgment file by Cook and Angela Smith seeking the dismissal of the same Count II, and upon Plaintiffs response thereto, and

THIS MATTER CAME TO BE HEARD upon the Demurrer to Count III (Medical Malpractice) filed by

Defendant Leslie J. Kryzanowski, M.D. ("Dr. Kryzanowski"), and upon Plaintiffs response thereto, and

THIS MATTER CAME TO BE HEARD upon the Motions for Sanctions filed by Defendants Deanna Cook and Angela Smith, and

IT APPEARING that by previous letter opinion dated June 2, 2005, and by subsequent Order dated June 27, 2005, both of which are incorporated herein by reference, this Court sustained the demurrers of the Defendants as to all counts of Plaintiff's Motion for Judgment, with leave to amend, and

IT FURTHER APPEARING that Plaintiff thereupon filed her AMJ, to which the Defendants filed their demurrers and other responsive pleadings, and

IT FURTHER APPEARING that following oral argument on the Defendants' demurrers, this court issued its letter opinion dated October 17, 2005, which is incorporated herein by reference, sustaining the demurrers of the Defendants as to Count I of Plaintiffs AMJ without leave to amend, sustaining the demurrer of Dr. Kryzanowski as to Count II of Plaintiffs AMJ without leave to amend, overruling the demurrer of Cook and Angela Smith as to Count II, and overruling the demurrer of Dr. Kryzanowski as to Count III, and

IT FURTHER APPEARING that the Defendants thereupon filed their further dispositive pleadings referenced in the first two paragraphs above, and oral argument was held on November 15, 2005, and

IT FURTHER APPEARING that Plaintiff thereupon filed her motion for leave to file a Second Amended Motion for Judgment, and

IT FURTHER APPEARING for the reasons stated in this Court's letter opinion dated November 22, 2005, which is incorporated herein by reference, that the Demurrers of Cook and Angela Smith as to Count II of Plaintiff's AMJ should be sustained, without further leave to amend, and

IT FURTHER APPEARING for the reasons stated in this Court's letter opinion dated November 22,2005, that Dr. Kryzanowski's Demurrer to Count III of Plaintiffs AMJ should be sustained, without further leave to amend, and IT FURTHER APPEARING that Plaintiffs Motion for Judgment and First Amended Motion for Judgment were filed by Plaintiff and her counsel, Thomas H. Roberts, Esquire in violation of Virginia Code Ann. § 8.01-271.1, that such pleadings were not well grounded in fact or warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and were interposed for an improper purpose to harass or to use unnecessary delay and needless increase in the cost of litigation, and that the conduct of Plaintiff and Plaintiff's counsel in the prosecution of this case was otherwise sanctionable under Code Section 8.01-271.1, and that the filing of Plaintiff's claim under 42 U.S.C. § 1983 was unreasonable, frivolous, meritless and vexation, so as to warrant an award of costs and attorneys' fees to Cook and Angela Smith pursuant to 42 D.S.C. § 1988, it is hereby

ORDERED that the Demurrers of Defendants Deanna Cook and Angela Smith to Count II of Plaintiff's AMJ are

sustained, and Count II is dismissed as to such Defendants with prejudice and without leave to amend, and it is hereby

ORDERED that the Demurrer of Defendant Dr. Kryzanowski to Count III of Plaintiff's AMJ is sustained and Count III is dismissed as to such Defendant with prejudice and without leave to amend, and it is herby

ORDERED that Plaintiff's motion for leave to file her Second Amend Motion for Judgment is denied, and it is hereby

ORDRED that insofar as no Counts remain pending as to any Defendant, this cause is hereby dismissed with prejudice as to all Defendants, and it is herby

ORDERED that for the reasons stated in the court's letter dated January 11, 2006, defendants Deanna Cook and Angela Smith's Motion for Sanctions is Denied.

Plaintiff's exceptions are noted.

The endorsements of counsel are waived pursuant to Rule 1:13.

And nothing further remaining to be done herein, it is ORDERED that his matter is stricken from the docket and placed among the ended causes of this court.

It is so ORDERED.

APPENDIX D

AMENDED MOTION FOR JUDGMENT IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND, COMMONWEALTH OF VIRGINIA DATED AND FILED JUNE 27, 2005.

VIRGINIA:
IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

BEVERLY SMITH,
Plaintiff,
vs. Case No. 760CL04S01780-00
LESLIE J. KRYZANOWSKI,
and
ANGELA SMITH,
and
DEANNA COOK,
Defendants.

FIRST AMENDED
Motion for Judgment

Comes now the plaintiff, by counsel, and for her first amended motion for judgment, moves for judgment jointly and severally against defendants LESLIE J. KRYZANOWSKI, ANGELA SMITH, and DEANNA COOK on the grounds and in the amount shown below:
1. Plaintiff Beverly Smith is a citizen of Virginia and the United States and is a resident of Goochland, Virginia.

2. Defendant Leslie Kryzanowski is a medical doctor specialized in psychiatry who provided medical and mental health treatment to Beverly Smith.
3. Defendant Angela Smith is a resident of Virginia who was a party litigant in a certain proceeding involving, inter alia, custody and visitation of a juvenile in the Juvenile and Domestic Relations District Court for Goochland County, Virginia.
4. Defendant Deanna Cook is a resident of Virginia and is an attorney licensed in the Commonwealth of Virginia and was at all times relevant herein acting as an agent and attorney for Angela Smith in addition to other capacities as set forth below.
5. Plaintiff Beverly Smith is the paternal grandmother of Stone Wyatt Smith, the juvenile who was the subject of a custody and visitation dispute by and between Angela Dawn Smith and Dean E. Smith in the Juvenile and Domestic Relations District Court for Goochland County, Virginia.
6. Plaintiff Beverly Smith was not a party or "party witness" to the litigation in the Juvenile and Domestic Relations District Court for Goochland County, Virginia.
7. In 2000, Virginia Code § 16.1-265 provided in pertinent part as follows:

Upon application of a party and pursuant to the rules of the Supreme Court of Virginia for the issuance of subpoenas, the clerk of the court shall issue, and the court on its own motion may issue, subpoenas requiring attendance and testimony of witnesses and production of records, documents or other tangible objects at any hearing. Subpoenas duces tecum for medical records shall be subject to the provisions of §§§§ 8.01-413 and 32.1-277.1:03 except that no separate fee shall be imposed. A subpoena may also be issued in a civil proceeding by an attorney-at-law who is an active member of

the Virginia State Bar at the time of issuance, as an officer of the court. Any such subpoena shall be on a form approved by the Committee on District Courts, signed by the attorney as if a pleading and shall include the attorney''s address. A copy, together with the attorney''s certificate of service pursuant to Rule 1:12, shall be mailed or delivered to the clerk''s office of the court in which the case is pending on the day of issuance by the attorney. The law governing subpoenas issued by a clerk shall apply mutatis mutandis, except that attorneys may not issue subpoenas in those cases in which they may not issue a summons as provided in §§ 8.01-407 and may not issue a subpoena duces tecum less than five business days prior to the date that production of evidence is required. When an attorney-at-law transmits one or more subpoenas or subpoenas duces tecum to a sheriff to be served in his jurisdiction, the provisions in §§ 8.01-407 regarding such transmittals shall apply. If the time for compliance with a subpoena issued by an attorney is less than fourteen days after service of the subpoena, the person to whom it is directed may serve upon the party issuing the subpoena a written objection setting forth any grounds therefor. If objection is made, the party on whose behalf the subpoena was issued and served shall not be entitled to compliance, except pursuant to an order of the court, but may, upon notice to the person to whom the subpoena was directed, move for an order to compel compliance. Upon such timely motion, the court may quash, modify or sustain the subpoena. (Emphasis added)

8. In or around August, 2002, under color of state law, pursuant to a procedural scheme created by statute, citing as authority for her actions, §§ 8.01-413, 16.1-89 and 16.1-265, Deanna Cook, an attorney in the Commonwealth of Virginia, acting for and on behalf of Angela Smith, a party to the

custody and visitation proceedings, by her attorney, issued an attorney issued subpoena duces tecum (See the attached Exhibit 1 incorporated herein by this reference with Exhibit "A" describing the medical/psychiatric records of Beverly Smith to be produced), commanding the production of Beverly Smith's medical/psychiatric records from Leslie J. Krzanowski without affording to Beverly Smith any notice that her records were being subpoenaed and all in violation of § 8.01-399(D) and § 32.1-127.1:03.

9. The subpoena was issued under color of state law by an officer of the court but was not a "court authorized subpoena."

10. In 2002, Virginia Code § 32.1-127.1:03(H)(1) provided in pertinent part, "No party to an action shall request or cause the issuance of a subpoena duces tecum for the medical records of a nonparty witness unless a copy of the request for the subpoena or a copy of the attorney-issued subpoena is provided to the nonparty witness simultaneously with filing the request or issuance of the attorney-issued subpoena."

11. Additionally, in 2002, Virginia Code § 32.1-127.1:03 provided in part that "In instances where medical records being subpoenaed are those of a ...nonparty witness, the party requesting or issuing the subpoena shall deliver to the ...nonparty witness together with the copy of the request for subpoena, or a copy of the subpoena in the case of an attorney-issued subpoena, a statement informing them of their rights and remedies...."

12. Additionally, in 2002, Virginia Code § 32.1-127.1:03 provided in part that the statement referenced above should be provided to the nonparty witness as follows:

NOTICE TO PATIENT

The attached document means that (insert name of party requesting or causing issuance of the subpoena) has either

asked the court to issue a subpoena or a subpoena has been issued by the other party's attorney to your doctor or other health care providers (names of health care providers inserted here) requiring them to produce your medical records. Your doctor or other health care provider is required to respond by providing a copy of your medical records. If you believe your records should not be disclosed and object to their disclosure, you have the right to file a motion with the clerk of the court to quash the subpoena. You may contact the clerk's office to determine the requirements that must be satisfied when filing a motion to quash and you may elect to contact an attorney to represent your interest. If you elect to file a motion to quash, it must be filed as soon as possible before the provider sends out the records in response to the subpoena. If you elect to file a motion to quash, you must notify your doctor or other health care provider(s) that you are filing the motion so that the provider knows to send the records to the clerk of court in a sealed envelope or package for safekeeping while your motion is decided.

13. Plaintiff Beverly Smith did not receive the foregoing notice or statement of rights and remedies.

14. The Virginia Code § 32.1-127.1:03(D) provides for disclosure of medical records under circumstances not present in this case. The code provides in pertinent part as follows: D. Health care entities may disclose health records:

> 13. To the attorney and/or guardian ad litem of a minor who represents such minor in any judicial or administrative proceeding, if the court or administrative hearing officer has entered an order granting the attorney or guardian ad litem this right and such attorney or guardian ad litem presents evidence to the health care entity of such order;

15. Leslie J. Krzanowski produced to Angela Smith and Deanna Cook and to the court the medical/psychiatric records of Beverly Smith without Beverly Smith's authorization or consent and without notice to Beverly Smith.
16. In turn, Angela Smith by her attorney Deanna Cook disseminated the medical/psychiatric information of Beverly Smith without Beverly Smith's authorization or consent and without notice to Beverly Smith.
17. Leslie J. Krzanowski and Angela Smith jointly engaged and participated with Deanna Cook, acting as an officer of the court, in depriving Beverly Smith of the confidential medical information contained in the medical records.

Count 1
42 U.S.C. § 1983

18. Paragraphs 1 - 17 are incorporated herein.
19. Plaintiff need not allege that the defendants were acting on behalf of the state, but instead that the defendants "under color of any statute, ordinance, regulation, custom or usage of" Virginia "subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" which is what plaintiff alleges by this and other paragraphs herein.
20. 42 U.S.C. § 1983 provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in

an action at law, suit in equity, or other proper proceeding for redress....

21. Plaintiff was deprived of (1) her medical privacy secured by the Constitution and laws and (2) her property right to the confidentiality of her medical records under Virginia law without due process.

22. The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law." 14th Amendment to the U.S. Constitution.

23. Beverly Smith has a constitutional right to medical privacy. See eg. Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705 (1973), Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678 (1965) (marital privacy in decisions of birth control).

24. Beverly Smith had a constitutional right to due process before her property was taken from her.

25. While the written, printed or electronically recorded material maintained by Dr. Leslie J. Krzanowski are by Virginia statute, the property of Dr. Krzanowski under Va. Code § 32.1-127.1:03, the plaintiff had a statutory right of privacy to the content and information of her medical/health records. Id. ("There is hereby recognized a patient's right of privacy in the content of a patient's medical record."(Va. Code § 32.1-127.1:03 as it read in 2002).

26. Beverly Smith challenges the constitutionality of Va. Code § 32.1-127.1:03 to the extent that it may be interpreted to provide any right of ownership to Dr. Krzanowski independent of Beverly Smith to the content and information in contrast to the written, printed or electronically recorded material maintained by Dr. Leslie J. Krzanowski.

27. Cook as an officer of the court acting under color of state law pursuant to a procedural scheme created by state statute deprived plaintiff of her property interest namely her medical

privacy without notice or an opportunity to be heard in violation of 14th Amendment to the U.S. Constitution.
28. Beverly Smith's deprivation of her medical privacy resulted from the exercise of a right or privilege having its source in state authority.
29. Beverly Smith was deprived of her right to notice and to an opportunity to be heard.
30. Defendants are appropriately characterized as "state actors."
31. Leslie J. Krzanowski and Angela Smith jointly and willfully engaged and participated with Deanna Cook, who was acting as an officer of the court when she issued the subpoena for medical records which contained the confidential medical information belonging to Beverly Smith depriving her of her property interest in the confidentiality of her medical information contained in the medical records, and thereby acted "under color" of law for purposes of 42 U.S.C. §1983.
32. Defendants acted pursuant to a procedural scheme created by statute which is the product of state action.
33. This is not the case of a mere private misuse of a state statute.
34. Leslie J. Krzanowski, Angela Smith, Deanna Cook, all acted under color of law, albeit as a result of the abuse of the authority by Deanna Cook, to obtain the disclosure of the medical/psychiatric information of Beverly Smith without her consent, authorization and without notice.
35. The privacy of the medical/psychiatric information of Beverly Smith constituted the private property of Beverly Smith.
36. The private property of Beverly Smith was taken without due process of law, without notice and without compensation.

37. As a result of the Constitutional violations, Beverly Smith has suffered the loss of her privacy, and further suffered emotional distress, including but not limited to physical injuries including loss of appetite, sleeplessness, nausea together with depression and other severe emotional injuries, and past and future medical bills.

Count 2
Negligence

38. Paragraphs 1 - 17 are incorporated herein.
39. Leslie J. Krzanowski, Angela Smith and Deanna Cook, each owed Beverly Smith a duty not to breach the privacy interest that Beverly Smith had to her medical/psychiatric records.
40. The foregoing duty was not voided by any abuse of authority by an attorney issuing a subpoena pursuant to §§ 8.01-413, 16.1-89 or 16.1-265 of the Code of Virginia where no notice was provided to Beverly Smith as required by § 32.1-127.1:03.
41. It is well established in Virginia that a health care provider owes a duty of reasonable care to its patient, including but not limited to a duty and obligation by the health care provider to preserve the confidentiality of information about the patient which was communicated to the health care provider or discovered by the health care provider during the course of treatment. Fairfax Hospital v. Curtis, 254, Va. 437, 442, 492 S.E.2d 642 (1997).
42. The foregoing duty was not voided by any abuse of authority by an attorney issuing a subpoena pursuant to §§ 8.01-413, 16.1-89 or 16.1-265 of the Code of Virginia where no notice was provided to Beverly Smith as required by § 32.1-127.1:03.

43. It is well established in Virginia that confidentiality is an integral aspect of the relationship between a health care provider and a patient. Fairfax Hospital v. Curtis, 254, Va. 437, 442, 492 S.E.2d 642 (1997).

44. The foregoing duty was not voided by any abuse of authority by an attorney issuing a subpoena pursuant to §§ 8.01-413, 16.1-89 or 16.1-265 of the Code of Virginia where no notice was provided to Beverly Smith as required by § 32.1-127.1:03.

45. It is well established in Virginia that in the absence of a statutory to the contrary, or absent a serious danger to the patient or others, a health care provider owes a duty to the patient not to disclose information gained from the patient during the course of treatment without the patient's authorization, and that violation of this duty gives rise to an action in tort. Fairfax Hospital v. Curtis, 254, Va. 437, 442, 492 S.E.2d 642 (1997).

46. The foregoing duty was not voided by any abuse of authority by an attorney issuing a subpoena pursuant to §§ 8.01-413, 16.1-89 or 16.1-265 of the Code of Virginia where no notice was provided to Beverly Smith as required by § 32.1-127.1:03.

47. In the absence of a statutory command to the contrary, or absent a serious danger to the patient or others, a health care provider owes a duty to the patient not to disclose information gained from the patient during the course of treatment without the patient's authorization, and that violation of this duty gives rise to an action in tort. Fairfax Hosp. by & Through INOVA Health Sys. Hosps. v. Curtis, 254 Va. 437, 442 (Va., 1997).

48. In the present case there was neither a statutory command to the contrary, nor a serious danger to the patient or others that relieved Dr. Kryzanowski of her duty.

49. The foregoing duty was not voided by any abuse of authority by an attorney issuing a subpoena pursuant to §§ 8.01-413, 16.1-89 or 16.1-265 of the Code of Virginia where no notice was provided to Beverly Smith as required by § 32.1-127.1:03.

50. It was well established that Virginia Code § 32.1-127.1:03, entitled "Patient health records privacy" provides in pertinent part that " There is hereby recognized a patient's right of privacy in the content of a patient's medical record. Patient records are the property of the provider maintaining them, and, except when permitted by this section or by another provision of state or federal law, no provider, or other person working in a health care setting, may disclose the records of a patient."

51. The foregoing duty was not voided by any abuse of authority by an attorney issuing a subpoena pursuant to §§ 8.01-413, 16.1-89 or 16.1-265 of the Code of Virginia where no notice was provided to Beverly Smith as required by § 32.1-127.1:03.

52. Numerous other courts have recognized a right of privacy in a patients records. See Whalen v. Roe, 429 U.S. 589, 598-99, 51 L. Ed. 2d 64, 97 S. Ct. 869 (1977); United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3rd Cir. 1980); Shoemaker v. Handel, 608 F. Supp. 1151, 1159 (D.N.J. 1985).

53. Nevertheless, defendants Leslie J. Krzanowski, Angela Smith, and Deanna Cook caused the confidential information of the plaintiff to be disclosed without plaintiff's consent and without following the procedures outlined in Va. Code § 32.1-127.1:03.

54. Deanna Cook issued and caused to be served the attorney issued subpoena for documents seeking the production of medical records of plaintiff without providing

to plaintiff a copy of the request in contravention of the duties imposed by Va. Code that provided in pertinent part that "No party to an action shall request or cause the issuance of a subpoena duces tecum for the medical records of a nonparty witness unless a copy of the request for the subpoena or a copy of the attorney-issued subpoena is provided to the nonparty witness simultaneously with filing the request or issuance of the attorney-issued subpoena."

55. Deanna Cook issued and caused to be served the attorney issued subpoena for documents seeking the production of medical records of plaintiff without providing to plaintiff a statement of rights and remedies in contravention of the duties imposed by Virginia Code § 32.1-127.1:03 that provided in pertinent part that provided in part that "In instances where medical records being subpoenaed are those of a ...nonparty witness, the party requesting or issuing the subpoena shall deliver to the ...nonparty witness together with the copy of the request for subpoena, or a copy of the subpoena in the case of an attorney-issued subpoena, a statement informing them of their rights and remedies...." including the following "NOTICE TO PATIENT

The attached document means that (insert name of party requesting or causing issuance of the subpoena) has either asked the court to issue a subpoena or a subpoena has been issued by the other party's attorney to your doctor or other health care providers (names of health care providers inserted here) requiring them to produce your medical records. Your doctor or other health care provider is required to respond by providing a copy of your medical records. If you believe your records should not be disclosed and object to their disclosure, you have the right to file a motion with the clerk of the court to quash the subpoena. You may contact the clerk's office to determine the requirements that must be satisfied when filing

a motion to quash and you may elect to contact an attorney to represent your interest. If you elect to file a motion to quash, it must be filed as soon as possible before the provider sends out the records in response to the subpoena. If you elect to file a motion to quash, you must notify your doctor or other health care provider(s) that you are filing the motion so that the provider knows to send the records to the clerk of court in a sealed envelope or package for safekeeping while your motion is decided.

56. The defendant Angela Smith acted by and through her agent as described above.

57. The defendant Dr. Kryzanowski delivered the medical records and disclosed the medical information and contents of the medical records to Deanna Cook, failed to protect and preserve the confidentiality of the her patient, the plaintiff, failing to refuse to comply with the attorney issued subpoena which did not meet the statutory requirements set forth in § 32.1-127.1:03, failing to notify the plaintiff of the receipt of a subpoena for the records, failing to move to quash the subpoena, failing to act in accordance with the duty of reasonable care of a health care provider owes to her patient, including but not limited to a duty and obligation by the health care provider to preserve the confidentiality of information about the patient which was communicated to the health care provider or discovered by the health care provider during the course of treatment as recognized by Fairfax Hospital v. Curtis, 254, Va. 437, 442, 492 S.E.2d 642 (1997) which provides no exception for attorney issued subpoena in contravention of Va. Code. § 32.1-127.1:03.

58. The disclosure by the defendants was voluntary.

59. The disclosure was not authorized by law.

60. The disclosure was not necessary in connection with the care of the patient or plaintiff.

61. The disclosure was not necessary in connection with the protection or enforcement any of the defendant's legal rights.
62. The disclosure was not done in order to comply with state or federal law.
63. The disclosure of information was not in conformity with the usual procedures in place designed to protect the confidential medical information of patients.
64. The defendants Leslie J. Krzanowski, Angela Smith and Deanna Cook had a duty to honor the implied promise of confidentiality of plaintiff's confidential medical and personal information.
65. The foregoing duty was not voided by any abuse of authority by an attorney issuing a subpoena pursuant to §§ 8.01-413, 16.1-89 or 16.1-265 of the Code of Virginia where no notice was provided to Beverly Smith as required by § 32.1-127.1:03.
66. When the patient does not manifestly place her medical condition at issue in a civil proceeding, then the statute requires a determination by a judicial officer whether there is a basis for disseminating the patient's confidential communications to third persons before the dissemination or disclosure.
67. Upon information and belief, no such determination was made.
68. Defendants Leslie J. Krzanowski, Angela Smith and Deanna Cook breached that duty by disclosing confidential information to unauthorized persons, including but not limited to plaintiff's son's attorney and to the court, Angela Smith and Deanna Cook.
69. Defendants Leslie J. Krzanowski, Angela Smith and Deanna Cook breached that duty by disclosing confidential information to unauthorized persons, including but not limited to plaintiff's son's attorney and to the court, Angela

Smith, Deanna Cook, and Deborah S. Tinsley, and violated the standard of care by disclosing confidential information to unauthorized persons.

70. As a direct and proximate result plaintiff has suffered physical injuries including loss of appetite, sleeplessness, nausea together with depression and other severe emotional injuries.

71. As a direct and proximate result plaintiff has suffered and will suffer serious physical, emotional and mental injuries together with past and future medical losses.

72. As a direct and proximate result of the breach and violation stated above, plaintiff suffered humiliation, embarrassment, and similar harm to her feelings, and is therefore entitled to damages for emotional distress and injuries which are presumed.

73. As a direct and proximate result of the breach and violation stated above, plaintiff suffered damages, including but not limited to the loss of privacy in her confidential personal and medical information.

Count 3
Malpractice against Dr. Leslie Krzanowski

74. Paragraphs 1 - 17 and 39 - 73 are incorporated herein.

75. Upon receipt of that information by the patient, the physician impliedly promises not to violate the confidence. Because the duty to honor the implied promise of confidentiality is but another component of the treatment rendered, the breach of that duty should be judged like the breach of the general duty. Thus, as with a violation of the standard of care generally, a breach of the duty of confidentiality, "resulting in damages, gives rise to a cause of action sounding in tort against the physician."

76. Defendant Leslie J. Krzanowski breached the terms of the promise and implied agreement that she had with plaintiff which resulted in past and future physical, emotional and mental injuries to the plaintiff together with past and future medical bills all of which were foreseeable at the time of the agreement to provide services and treatment

WHEREFORE, Plaintiff moves for judgment as follows:
a. As to Count 1 and 2, jointly and severally against Leslie J. Krzanowski, Angela Smith, and Deanna Cook in the amount of $250,000.00 in compensatory damages or such other amount as the law may allow, together with costs and attorneys fees in this matter expended; and
b. As to Count 1, plaintiff also prays for such further relief as may be provided by 42 U.S.C. § 1983.
c. As to Count 3, against Leslie J. Krzanowski in the amount of $250,000.00 in damages or such other amount as the law may allow, together with costs in this matter expended.
d. Such other and further relief as may be appropriate.

Trial by jury is demanded.

Respectfully Submitted:
BEVERLY SMITH

By: /s/
Counsel

Thomas H. Roberts, Esq.
VSB: # 26014
Thomas H. Roberts & Associates, P.C.
105 South 1st Street
Richmond, Virginia 23219-3718

Tele: (804) 783-2000
Fax: (804) 783-2105

TO:1804783 2105 P:2/4

SUBPOENA DUCES TECUM (CIVIL) -
ATTORNEY ISSUED VA. CODE §§ 8.01-411, 16.1-265,
Commonwealth of Virginia Supreme Court Rules 4:9

Case No. J10005182010001A0044450:00

January 30, 2003 at 9:30 a.m.
HEARING DATE AND TIME

Goochland Juvenile and Domestic Relations District Court
2939 River Road West, P.O. Box 47, Goochland, VA 23063
COURT ADDRESS

Angela D. Smith v/s Dean E. Smith

TO THE PERSON AUTHORIZED BY LAW TO SERVE THIS PROCESS:

You are commanded to summon

Dr. Leslie Kenyon-Jenkins, Patient's Psychiatrist
NAME
7501 Forest Avenue, Ste. 406
STREET ADDRESS
Richmond Virginia 23229
CITY STATE ZIP

TO the person summoned: You are commanded to make available the documents and tangible things designated and described below:

SEE ATTACHED EXHIBIT "A"

at 701 E. Franklin St., Ste. 1500, Richmond, VA 23219-0826 on December 20, 2002 at 2:00 p.m.
LOCATION DATE AND TIME

to permit such party or someone acting in his or her behalf to inspect and copy, test or sample such tangible things in your possession, custody or control.

This Subpoena Duces Tecum is issued by the attorney for and on behalf of

Angela D. Smith
PARTY NAME

Deanna D. Cook	32771
NAME OF ATTORNEY	VIRGINIA STATE BAR NUMBER
Brenner, Ivins, Cook & Marcus	(804) 543-1400
OFFICE ADDRESS	TELEPHONE NUMBER OF ATTORNEY
P.O. Box 826, Richmond, VA 23218-0826	(804) 543-1466
OFFICE ADDRESS	TELEPHONE NUMBER OF ATTORNEY
December 5, 2002	Deanna D. Cook
DATE ISSUED	SIGNATURE OF ATTORNEY

Notice to Recipient: See page two for further information.

RETURN OF SERVICE (see page two of this form)

NAME OF PERSON SERVED (IF OTHER THAN NAMED ABOVE)

DATE AND TIME OF SERVICE

EXHIBIT 1

BEST AVAILABLE COPY

TO the person summoned:

If you are served with this subpoena less than 14 days prior to the date first compliance with this subpoena is required, you may object by certifying the party who issued the subpoena of your objection in writing and describing the basis of your objection in that writing.

X This SUBPOENA DUCES TECUM is being served by a private process server who must provide proof of service in accordance with Va. Code § 8.01-325

TO the person authorized to serve this process: Upon execution, the return of this process shall be made to the clerk of court.

NAME _____

ADDRESS _____

☐ PERSONAL SERVICE (a) to _____

(b) No _____

Being unable to make personal service, a copy was delivered in the following manner:

☐ Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above.

_____

☐ Posted on front door or such other door as appear to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)

☐ not found _____, Sheriff

_____, Deputy Sheriff

DATE

CERTIFICATE OF COUNSEL

I, Deanna D. Cote, counsel for Angela D. Smith, hereby certify that a copy of the foregoing subpoena duces tecum was mailed to James M. Trautman counsel of record for Sean B. Smith on the 5th day of December, 2002.

Deanna D. Cote
Counsel for Angela D. Smith

[illegible]

[illegible]

EXHIBIT "A"

Produce the originals or legible copies of the following documents to the law offices of Bremner, Janus, Cook & Marcus, 701 E. Franklin Street, Ste. 1500, Richmond, VA 23219, on or before December 23, 2002 at 3:00 p.m.:

Copies of the full and complete file, omitting nothing, of Beverly Smith, (current address: 1284 Marlin Road, Goochland, VA 23063), including but not limited to, all examination reports and notes; medical histories and consultation reports; correspondence to and from the above-named individuals other physicians; correspondence to and from family members of the above-named individuals; progress and office notes and nurses' notes; psychological, psychiatric and neuropsychological test data, tests scores, test answers, raw data and evaluation and consultation reports; therapy reports and in-progress notes; statements and reports of condition, treatment, diagnosis and prognosis; hospital admission and discharge reports; emergency medical care reports, laboratory tests results and reports, bills and/or statements, from the beginning of treatment through the present.

APPENDIX E

VA CODE § 32.1-127.1:03, AS AMENDED IN 2002

§ 32.1-127.1:03. Patient health records privacy.

A. There is hereby recognized a patient's right of privacy in the content of a patient's medical record. Patient records are the property of the provider maintaining them, and, except when permitted by this section or by another provision of state or federal law, no provider, or other person working in a health care setting, may disclose the records of a patient.

Patient records shall not be removed from the premises where they are maintained without the approval of the provider, except in accordance with a court order or subpoena consistent with § 8.01-413 C or with this section or in accordance with the regulations relating to change of ownership of patient records promulgated by a health regulatory board established in Title 54.1.

No person to whom disclosure of patient records was made by a patient or a provider shall redisclose or otherwise reveal the records of a patient, beyond the purpose for which such disclosure was made, without first obtaining the patient's specific consent to such redisclosure. This redisclosure prohibition shall not, however, prevent (i) any provider who receives records from another provider from making subsequent disclosures as permitted under this section or (ii) any provider from furnishing records and aggregate or other data, from which patient-identifying prescription information has been removed, encoded or encrypted, to qualified

researchers, including, but not limited to, pharmaceutical manufacturers and their agents or contractors, for purposes of clinical, pharmaco-epidemiological, pharmaco-economic, or other health services research.

B. As used in this section:

"Agent" means a person who has been appointed as a patient's agent under a power of attorney for health care or an advance directive under the Health Care Decisions Act (§ 54.1-2981 et seq.).

"Guardian" means a court-appointed guardian of the person.

"Health services" includes, but is not limited to, examination, diagnosis, evaluation, treatment, pharmaceuticals, aftercare, habilitation or rehabilitation and mental health therapy of any kind.

"Parent" means a biological, adoptive or foster parent.

"Patient" means a person who is receiving or has received health services from a provider.

"Patient-identifying prescription information" means all prescriptions, drug orders or any other prescription information that specifically identifies an individual patient.

"Provider" shall have the same meaning as set forth in the definition of "health care provider" in § 8.01-581.1, except that state-operated facilities shall also be considered providers for the purposes of this section. Provider shall also include all persons who are licensed, certified, registered or

permitted by any of the health regulatory boards within the Department of Health Professions, except persons regulated by the Board of Funeral Directors and Embalmers or the Board of Veterinary Medicine.

"Record" means any written, printed or electronically recorded material maintained by a provider in the course of providing health services to a patient concerning the patient and the services provided. "Record" also includes the substance of any communication made by a patient to a provider in confidence during or in connection with the provision of health services to a patient or information otherwise acquired by the provider about a patient in confidence and in connection with the provision of health services to the patient.

C. The provisions of this section shall not apply to any of the following:

1. The status of and release of information governed by §§ 65.2-604 and 65.2-607 of the Virginia Workers' Compensation Act; or

2. Except where specifically provided herein, the records of minor patients.

D. Providers may disclose the records of a patient:

1. As set forth in subsection E of this section, pursuant to the written consent of the patient or in the case of a minor patient, his custodial parent, guardian or other person authorized to consent to treatment of minors pursuant to § 54.1-2969; also, in emergency cases or situations where it is

impractical to obtain the patient's written consent, pursuant to the patient's oral consent for a provider to discuss the patient's records with a third party specified by the patient;

2. In compliance with a subpoena issued in accord with subsection H of this section, pursuant to court order upon good cause shown or in compliance with a subpoena issued pursuant to subsection C of § 8.01-413;

3. In accord with subsection F of § 8.01-399 including, but not limited to, situations where disclosure is reasonably necessary to establish or collect a fee or to defend a provider or the provider's employees or staff against any accusation of wrongful conduct; also as required in the course of an investigation, audit, review or proceedings regarding a provider's conduct by a duly authorized law-enforcement, licensure, accreditation, or professional review entity;

4. In testimony in accordance with §§ 8.01-399 and 8.01-400.2;

5. In compliance with the provisions of § 8.01-413;

6. As required or authorized by any other provision of law including contagious disease, public safety, and suspected child or adult abuse reporting requirements, including, but not limited to, those contained in §§ 32.1-36, 32.1-36.1, 32.1-40, 32.1-41, 32.1-276.5, 32.1-283, 32.1-283.1, 37.1-98.2, 53.1-40.10, 54.1-2403.3, 54.1-2906, 54.1-2907, 54.1-2966, 54.1-2966.1, 54.1-2967, 54.1-2968, 63.1-55.3 and 63.1-248.11 63.1-248.3;

7. Where necessary in connection with the care of the patient, including in the implementation of a hospital routine contact process;

8. In the normal course of business in accordance with accepted standards of practice within the health services setting; however, the maintenance, storage, and disclosure of the mass of prescription dispensing records maintained in a pharmacy registered or permitted in Virginia shall only be accomplished in compliance with §§ 54.1-3410, 54.1-3411 and 54.1-3412;

9. When the patient has waived his right to the privacy of the medical records;

10. When examination and evaluation of a patient are undertaken pursuant to judicial or administrative law order, but only to the extent as required by such;

11. To the guardian ad litem in the course of a guardianship proceeding of an adult patient authorized under Article 1.1 (§ 37.1-134.6 et seq.) of Chapter 4 of Title 37.1;

12. To the attorney appointed by the court to represent a patient in a civil commitment proceeding under § 37.1-67.3;

13. To the attorney and/or guardian ad litem of a minor patient who represents such minor in any judicial or administrative proceeding, provided that the court or administrative hearing officer has entered an order granting the attorney or guardian ad litem this right and such attorney or guardian ad litem presents evidence to the provider of such order;

14. With regard to the Court-Appointed Special Advocate (CASA) program, a minor's records in accord with § 9.1-156;

15. To an agent appointed under a patient's power of attorney or to an agent or decision maker designated in a patient's advance directive for health care or for decisions on anatomical gifts and organ, tissue or eye donation or to any other person consistent with the provisions of the Health Care Decisions Act (§ 54.1-2981 et seq.);

16. To third-party payors and their agents for purposes of reimbursement;

17. As is necessary to support an application for receipt of health care benefits from a governmental agency or as required by an authorized governmental agency reviewing such application or reviewing benefits already provided;

18. Upon the sale of a medical practice as provided in § 54.1-2405; or upon a change of ownership or closing of a pharmacy pursuant to regulations of the Board of Pharmacy;

19. In accord with § 54.1-2400.1 B, to communicate a patient's specific and immediate threat to cause serious bodily injury or death of an identified or readily identifiable person;

20. To the patient, except as provided in subsections E and F of this section and subsection B of § 8.01-413;

21. In the case of substance abuse records, when permitted by and in conformity with requirements of federal law found in 42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2;

22. In connection with the work of any entity established as set forth in § 8.01-581.16 to evaluate the adequacy or quality of professional services or the competency and qualifications for professional staff privileges;

23. If the records are those of a deceased or mentally incapacitated patient to the personal representative or executor of the deceased patient or the legal guardian or committee of the incompetent or incapacitated patient or if there is no personal representative, executor, legal guardian or committee appointed, to the following persons in the following order of priority: a spouse, an adult son or daughter, either parent, an adult brother or sister, or any other relative of the deceased patient in order of blood relationship;

24. For the purpose of conducting record reviews of inpatient hospital deaths to promote identification of all potential organ, eye, and tissue donors in conformance with the requirements of applicable federal law and regulations, including 42 C.F.R. § 482.45, (i) to the provider's designated organ procurement organization certified by the United States Health Care Financing Administration and (ii) to any eye bank or tissue bank in Virginia certified by the Eye Bank Association of America or the American Association of Tissue Banks;

25. To the Office of the Inspector General for Mental Health, Mental Retardation and Substance Abuse Services pursuant to Chapter 16 (§ 37.1-255 et seq.) of Title 37.1; and

26. (Expires July 1, 2003) To an entity participating in the activities of a local health partnership authority established

pursuant to Article 6.1 (§ 32.1-122.10:001 et seq.) of Chapter 4 of Title 32.1, pursuant to subdivision D 1 of this section.

E. Requests for copies of medical records shall (i) be in writing, dated and signed by the requester; (ii) identify the nature of the information requested; and (iii) include evidence of the authority of the requester to receive such copies and identification of the person to whom the information is to be disclosed. The provider shall accept a photocopy, facsimile, or other copy of the original signed by the requestor as if it were an original. Within fifteen days of receipt of a request for copies of medical records, the provider shall do one of the following: (i) furnish such copies to any requester authorized to receive them; (ii) inform the requester if the information does not exist or cannot be found; (iii) if the provider does not maintain a record of the information, so inform the requester and provide the name and address, if known, of the provider who maintains the record; or (iv) deny the request (a) under subsection F, (b) on the grounds that the requester has not established his authority to receive such records or proof of his identity, or (c) as otherwise provided by law. Procedures set forth in this section shall apply only to requests for records not specifically governed by other provisions of this Code, federal law or state or federal regulation.

F. Except as provided in subsection B of § 8.01-413, copies of a patient's records shall not be furnished to such patient or anyone authorized to act on the patient's behalf where the patient's attending physician or the patient's clinical psychologist has made a part of the patient's record a written statement that, in his opinion, the furnishing to or review by the patient of such records would be injurious to the patient's

health or well-being. If any custodian of medical records denies a request for copies of records based on such statement, the custodian shall permit examination and copying of the medical record by another such physician or clinical psychologist selected by the patient, whose licensure, training and experience relative to the patient's condition are at least equivalent to that of the physician or clinical psychologist upon whose opinion the denial is based. The person or entity denying the request shall inform the patient of the patient's right to select another reviewing physician or clinical psychologist under this subsection who shall make a judgment as to whether to make the record available to the patient. Any record copied for review by the physician or clinical psychologist selected by the patient shall be accompanied by a statement from the custodian of the record that the patient's attending physician or clinical psychologist determined that the patient's review of his record would be injurious to the patient's health or well-being.

G. A written consent to allow release of patient records may, but need not, be in the following form:

CONSENT TO RELEASE OF CONFIDENTIAL HEALTH CARE

INFORMATION

Patient Name.....
Provider Name.....
Person, agency or provider to whom disclosure is to be made.....
Information or Records to be disclosed.....

As the person signing this consent, I understand that I am giving my permission to the above-named provider or other named third party for disclosure of confidential health care records. I also understand that I have the right to revoke this consent, but that my revocation is not effective until delivered in writing to the person who is in possession of my records. A copy of this consent and a notation concerning the persons or agencies to whom disclosure was made shall be included with my original records. The person who receives the records to which this consent pertains may not redisclose them to anyone else without my separate written consent unless such recipient is a provider who makes a disclosure permitted by law.

This consent expires on (date).....

Signature of Patient..... Date.....

H. 1. No party to an action shall request the issuance of a subpoena duces tecum for an opposing party's medical records or cause a subpoena duces tecum to be issued by an attorney unless a copy of the request for the subpoena or a copy of the attorney-issued subpoena is provided to opposing counsel or the opposing party if they are pro se, simultaneously with filing the request or issuance of the subpoena. No party to an action shall request or cause the issuance of a subpoena duces tecum for the medical records of a nonparty witness unless a copy of the request for the subpoena or a copy of the attorney-issued subpoena is provided to the nonparty witness simultaneously with filing the request or issuance of the attorney-issued subpoena.

In instances where medical records being subpoenaed are those of a pro se party or nonparty witness, the party requesting or issuing the subpoena shall deliver to the pro se party or nonparty witness together with the copy of the request for subpoena, or a copy of the subpoena in the case of an attorney-issued subpoena, a statement informing them of their rights and remedies. The statement shall include the following language and the heading shall be in boldface capital letters:

NOTICE TO PATIENT

The attached document means that (insert name of party requesting or causing issuance of the subpoena) has either asked the court to issue a subpoena or a subpoena has been issued by the other party's attorney to your doctor or other health care providers (names of health care providers inserted here) requiring them to produce your medical records. Your doctor or other health care provider is required to respond by providing a copy of your medical records. If you believe your records should not be disclosed and object to their disclosure, you have the right to file a motion with the clerk of the court to quash the subpoena. You may contact the clerk's office to determine the requirements that must be satisfied when filing a motion to quash and you may elect to contact an attorney to represent your interest. If you elect to file a motion to quash, it must be filed as soon as possible before the provider sends out the records in response to the subpoena. If you elect to file a motion to quash, you must notify your doctor or other health care provider(s) that you are filing the motion so that the provider knows to send the records to the clerk of court in a sealed envelope or package for safekeeping while your motion is decided.

2. Any party filing a request for a subpoena duces tecum or causing such a subpoena to be issued for a patient's medical records shall include a Notice to Providers in the same part of the request where the provider is directed where and when to return the records. Such notice shall be in boldface capital letters and shall include the following language:

NOTICE TO PROVIDERS

IF YOU RECEIVE NOTICE THAT YOUR PATIENT HAS FILED A MOTION TO QUASH (OBJECTING TO) THIS SUBPOENA, OR IF YOU FILE A MOTION TO QUASH THIS SUBPOENA, SEND THE RECORDS ONLY TO THE CLERK OF THE COURT WHICH ISSUED THE SUBPOENA OR IN WHICH THE ACTION IS PENDING AS SHOWN ON THE SUBPOENA USING THE FOLLOWING PROCEDURE: PLACE THE RECORDS IN A SEALED ENVELOPE AND ATTACH TO THE SEALED ENVELOPE A COVER LETTER TO THE CLERK OF COURT WHICH STATES THAT CONFIDENTIAL HEALTH CARE RECORDS ARE ENCLOSED AND ARE TO BE HELD UNDER SEAL PENDING THE COURT'S RULING ON THE MOTION TO QUASH THE SUBPOENA. THE SEALED ENVELOPE AND THE COVER LETTER SHALL BE PLACED IN AN OUTER ENVELOPE OR PACKAGE FOR TRANSMITTAL TO THE COURT.

3. Health care providers shall provide a copy of all records as required by a subpoena duces tecum or court order for such medical records. If the health care provider has, however, actual receipt of notice that a motion to quash the subpoena

has been filed or if the health care provider files a motion to quash the subpoena for medical records, then the health care provider shall produce the records to the clerk of the court issuing the subpoena or in whose court the action is pending, where the court shall place the records under seal until a determination is made regarding the motion to quash. The securely sealed envelope shall only be opened on order of the judge. In the event the court grants the motion to quash, the records shall be returned to the health care provider in the same sealed envelope in which they were delivered to the court. In the event that a judge orders the sealed envelope to be opened to review the records in camera, a copy of the judge's order shall accompany any records returned to the provider. The records returned to the provider shall be in a securely sealed envelope.

4. It is the duty of any party requesting a subpoena duces tecum for medical records or the attorney issuing the subpoena duces tecum to determine whether the patient whose records are sought is pro se or a nonparty. Any request for a subpoena duces tecum and any attorney-issued subpoena for the medical records of a nonparty or of a pro se party shall direct the provider (in boldface type) not to produce the records until ten days after the date on which the provider is served with the subpoena duces tecum and shall be produced no later than twenty days after the date of such service.

In the event that the individual whose records are being sought files a motion to quash the subpoena, the court shall decide whether good cause has been shown by the discovering party to compel disclosure of the patient's private records over the patient's objections. In determining whether

good cause has been shown, the court shall consider (i) the particular purpose for which the information was collected; (ii) the degree to which the disclosure of the records would embarrass, injure, or invade the privacy of the individual; (iii) the effect of the disclosure on the individual's future health care; (iv) the importance of the information to the lawsuit or proceeding; and (v) any other relevant factor.

The provisions of this subsection have no application to subpoenas for medical records requested under § 8.01-413, or issued by a duly authorized administrative agency conducting an investigation, audit, review or proceedings regarding a provider's conduct. The provisions of this subsection apply to the medical records of both minors and adults.

A subpoena for substance abuse records must conform to the requirements of federal law found in 42 C.F.R. Part 2, Subpart E.

Providers may testify about the medical records of a patient in compliance with §§ 8.01-399 and 8.01-400.2.